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Domestic Violence as a Human Rights Issue: Rumor v. Italy

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Domestic Violence as a Human Rights Issue: *Rumor v. Italy*.

Abstract.

*The article focuses on the recent developments as regards domestic violence within the context of the Council of Europe. Since 2007 the European Court of Human Rights has issued a series of important judgments in cases involving domestic violence. The most recent of these is *Rumor v. Italy*, in which the Court issued its judgment on 27 May 2014. The article analyses this case in the context of the Court's previous jurisprudence on domestic violence. In addition, on 1 August 2014 the Council of Europe Convention on preventing and combating violence against women and domestic violence entered into force, and the article will include a number of reflections on the potential held by this Convention. No violation of the European Convention on Human Rights was found in *Rumor*, however the question of whether Italy would have been in breach of the provisions of the new Convention, to which it is a party, had this Convention been in force at the time of the relevant events, will be examined.*

Domestic violence affects vast numbers of women in every state around the globe.¹ Although it seems clear that the practice of domestic violence constitutes a breach of internationally recognised rights such as the right to be free from torture and inhuman or degrading treatment; the right to private and family life; and, in some circumstances, the right to life itself; it is only relatively recently that domestic violence has been analysed through the lens of human rights law. There have been important developments at the United Nations level and within the Inter-American and African regional systems as regards the recognition of domestic violence as a human rights issue, and the paper will

¹ Although domestic violence against male victims is certainly an important issue, the international human rights bodies have to date largely approached domestic violence as a form of violence against women.

begin with an overview of these developments in order to provide the context for the discussion.

However, the focus of this paper is on the recent developments as regards domestic violence within the context of the Council of Europe. In research carried out by the European Union Agency for Fundamental Rights, it was found that just over one in five women have experienced physical and/or sexual violence from a current or former partner.² Although this research was carried out only in the 28 states which make up the European Union, as opposed to all 47 states which constitute the Council of Europe, the results of the research can nevertheless be said to be indicative of levels of domestic violence across Europe as a whole. Beginning in 2007 the European Court of Human Rights has issued a series of important judgments in cases involving domestic violence. The most recent of these cases is *Rumor v. Italy*,³ in which the Court issued its judgment on 27 May 2014. This case will be analysed in the context of the Court's previous case law on domestic violence. Also, on 1 August 2014 the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention)⁴ entered into force. The article will therefore include a number of reflections on the potential held by this Convention. No violation of the European Convention on Human Rights was found in *Rumor*, however had the Istanbul Convention been in force in Italy at the time of the events in question, would the state have been in breach of its provisions?

1. Domestic Violence as a Human Rights Issue

Although domestic violence constitutes a clear violation of a number of well-established human rights, it was not until relatively recently that this issue was recognised as falling within the ambit of international human rights law. The UN Convention on the

² European Union Agency for Fundamental Rights, 'Violence against women: an EU-wide survey', (2014).

³ Appl. no. 72964/10, Judgment of 27 May 2014. All ECtHR decisions are available online at <http://hudoc.echr.coe.int/>

⁴ CETS No.: 210.

Elimination of All Forms of Violence against Women (CEDAW)⁵ makes no express mention of domestic violence, however in 1992 the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) issued its immensely important General Recommendation 19 which interpreted CEDAW as prohibiting violence against women in both the public and private contexts.⁶ In its Concluding Observations on the periodic reports submitted by states parties to CEDAW, the Committee regularly makes recommendations on the measures which states should adopt to address the issue of domestic violence. In addition, a number of the individual complaints which have been taken under the Optional Protocol to CEDAW have involved domestic violence.⁷

In 1993 the UN General Assembly issued its Declaration on the Elimination of Violence against Women. This instrument places a duty on states to, ‘Exercise due diligence to prevent...acts of violence against women, whether these acts are perpetrated by the State or by private persons.’⁸ In 1994 a Special Rapporteur on violence against women, its causes and consequences, was appointed by the UN Commission on Human Rights, and in 1996 the Special Rapporteur produced a framework for model legislation on domestic violence.⁹ In addition, the Platform for Action which resulted from the Fourth World Conference on Women held in 1995 in Beijing, contained detailed recommendations on the measures which states should adopt in response to violence against women, including domestic violence.¹⁰

⁵ (1979) 1249 UNTS 13.

⁶ CEDAW Committee, General Recommendation 19, U.N. Doc A/47/38, 1992, para. 9.

⁷ *AT v Hungary* (Communication No.: 2/2003, 26 January 2005); *Goekce v Austria* (Communication No.: 5/2005, 6 August 2007); *Yildirim v Austria* (Communication No.: 6/2005, 6 August 2007); *V.K. v Bulgaria* (Communication No.: 20/0008, 25 July 2011); *Jallow v Bulgaria* (Communication No.: 32/2011, 23 July 2012).

⁸ GA Res. 48/104, 20 December 1993, Art 4(c).

⁹ ‘A framework for model legislation on domestic violence’, E/CN.4/1996/53/Add.2, 2 February 1996.

¹⁰ United Nations Fourth World Conference on Women, Platform for Action, September 1995. For further discussion of developments at the UN level, see R. McQuigg, *International Human Rights Law and Domestic Violence* (2011) at 78-98.

In relation to regional systems of human rights protection, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belem do Para)¹¹ was adopted in 1994 by the General Assembly of the Organization of American States. Although the term ‘domestic violence’ is not used in this instrument, domestic abuse is approached as a facet of violence against women more generally. Article 12 of the Convention provides for the lodging of petitions concerning breaches of this instrument with the Inter-American Commission on Human Rights. The seminal petition regarding domestic violence which has been lodged using this mechanism is that of *Maria da Penha Maia Fernandes v. Brazil*.¹² This petition alleged that the state had condoned domestic violence perpetrated against Mrs Fernandes, which had culminated in her attempted murder. In finding breaches of the Convention of Belem do Para and also of the American Convention on Human Rights, the Commission stated that the failure to prosecute and convict the perpetrator was an indication that the state condoned the violence suffered by Mrs Fernandes.

As regards the African Union, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) was adopted in 2003.¹³ Again the term ‘domestic violence’ is not used in this instrument, however under article 1(b) of the Protocol, ‘violence against women’ is defined as encompassing ‘all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts’. The Protocol proceeds to place a range of obligations on states parties in relation to violence against women, including domestic violence.

In relation to the Council of Europe, on 30 April 2002 the Committee of Ministers adopted Recommendation (2002)5 on the protection of women against violence. A monitoring framework relating to implementation by member states of this

¹¹ 33 I.L.M. 1534.

¹² Case 12.051, Report No. 54/01 (2001).

¹³ CAB/LEG/66.6.

Recommendation was established in 2005 and, at the time of writing, four rounds of monitoring have taken place. The Istanbul Convention entered into force on 1 August 2014 and has currently been ratified by 16 states.¹⁴ This instrument constitutes a crucial development as regards the response of the Council of Europe to violence against women in all its forms, and will be further discussed later in this paper. In addition, over the past eight years the European Court of Human Rights has considered a substantial number of cases on the issue of domestic violence, the most recent of which is *Rumor v Italy*.

2. The Facts of *Rumor v Italy*

In *Rumor*, the applicant's then partner (referred to in the European Court's judgment as J.C.N.) had attacked her in November 2008, hitting her several times and threatening her with a knife and a pair of scissors. J.C.N. then locked the applicant in their flat. One of the couple's two children witnessed part of the aggression. The police were alerted, and the applicant was taken to hospital, where she was diagnosed with concussion, head injuries and bruising. J.C.N. was arrested and charged with attempted murder, kidnapping, aggravated violence and threatening behaviour. In April 2009 he was convicted and given an initial prison sentence of four years and eight months, which was reduced in December 2009 to three years and four months. After the sentence became final, J.C.N. applied to serve the remainder of his sentence under house arrest at a reception centre located approximately 15 kilometres from the applicant's home. This request was granted in June 2010. J.C.N. then applied for permission to work outside the centre, a request which was granted in September 2010. J.C.N. completed his sentence in August 2011, however he decided to continue residing at the centre. In May 2009 the applicant had been granted sole custody of the couple's two children, and in February 2010 the Juvenile Court prohibited any form of contact between J.C.N. and the children.

The applicant claimed that following the violence inflicted upon her by J.C.N., she lived in a state of constant fear. She had undergone psychological support therapy, as had her

¹⁴ Albania, Andorra, Austria, Bosnia and Herzegovina, Denmark, France, Italy, Malta, Monaco, Montenegro, Portugal, Serbia, Slovenia, Spain, Sweden and Turkey.

son, who had witnessed the violence. The applicant argued that there had been a violation of her right to be free from torture and inhuman or degrading treatment under Article 3 of the European Convention, and also a breach of the Article 14 prohibition of discrimination when taken in conjunction with Article 3. She argued that the Italian authorities had failed to protect and support her following the violence which she had suffered. The applicant claimed that these omissions together with the inadequacy of the Italian legislative framework in combating domestic violence proved that she had been discriminated against on the ground of gender. The applicant stated that she had not been informed when J.C.N. had been granted house arrest, and that she had only become aware of this when she had received a telephone call from J.C.N. himself. In addition, at the beginning of J.C.N.'s detention, she had received several letters from him which she viewed as being of a threatening nature. The applicant was of the opinion that J.C.N. continued to pose a threat both to her life and to the lives of her children. In addition, she argued that the proximity to her home of the facility hosting J.C.N. had contributed to her fear of a re-occurrence of the violence. She also alleged that she had been contacted by a worker at the facility for the purposes of setting up a telephone conversation between J.C.N. and their son in August 2010. As any form of contact between J.C.N. and the children had been prohibited, the applicant viewed this incident as casting doubt on the appropriateness of the facility. She maintained that she was in a position of vulnerability, and that the state authorities had failed to assist her, as they had omitted to put in place sufficient measures to protect her from further violence at the hands of J.C.N.

3. Application of Article 3

In examining the merits of the case under Article 3, the European Court stated it considered the applicant to be a 'vulnerable individual', due to the physical injuries which she had suffered as a result of being attacked by her partner, and to her fear of further violence.¹⁵ The Court held that the violence and the ensuing psychological consequences were sufficiently serious to constitute ill-treatment within the meaning of

¹⁵ At para. 60.

Article 3,. The Court then considered whether the state had complied with its positive obligations to ensure that individuals within its jurisdiction were protected against all forms of ill-treatment encompassed by Article 3, including where such treatment was administered by private individuals. The Court stated that,

This obligation should include effective protection of, *inter alios*, an identified individual or individuals from the criminal acts of a third party, as well as reasonable steps to prevent ill-treatment of which the authorities knew or ought to have known ... Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.¹⁶

However it was not the role of the Court ‘to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to ensure compliance with their positive obligations under Article 3 of the Convention’.¹⁷

In applying these principles to the facts of the case, the Court stated that the Italian police, prosecutors and courts had not remained passive, as J.C.N. had been arrested and charged with attempted murder, kidnapping, aggravated violence and threatening behaviour. He had been convicted and ultimately sentenced to detention for three years and four months. The Court noted that having J.C.N. living at a distance of only 15 kilometres from her home had ‘a negative impact’ on the applicant.¹⁸ However, the Court was of the view that prior to the application for house arrest having been granted, the post-sentencing judge seemed to have carefully assessed the suitability of the facility. As regards the applicant’s assertion that she had not been kept informed regarding the criminal proceedings against J.C.N., the Court stated that, ‘the Convention may not be interpreted as imposing a general obligation on States to inform the victim of ill-treatment about the criminal proceedings against the perpetrator, including about possible

¹⁶ At para. 58.

¹⁷ At para. 59.

¹⁸ At para. 66.

release on parole from prison or transfer to house arrest.’¹⁹ The Court concluded that, ‘the authorities had put in place a legislative framework allowing them to take measures against persons accused of domestic violence and that that framework was effective in punishing the perpetrator of the crime of which the applicant was victim and preventing the recurrence of violent attacks against her physical integrity.’²⁰ The Court held therefore that there had been no violation of Article 3, either taken alone or in conjunction with Article 14.

4. The Court’s Prior Use of Article 3 in Domestic Violence Cases

During the past eight years, the European Court has built up a substantial and important body of jurisprudence on domestic violence in a relatively short space of time. 17 cases directly focused on the issue of domestic violence have gone to a full hearing.²¹ Violations of the right to life under Article 2 of the Convention; the right to be free from torture and from inhuman or degrading treatment under Article 3; the right to respect for private and family life under Article 8; and the prohibition of discrimination under Article 14 have all been found in cases involving domestic violence. However, *Rumor* is notable for the fact that it constitutes the first case directly focused on domestic violence which has gone to a full hearing before the Court and in which no violation of the Convention has been found.²²

¹⁹ At para. 72.

²⁰ At para. 76.

²¹ *Rumor v Italy*; *Kontrova v. Slovakia*, Appl. no. 7510/04, Judgment of 31 May 2007; *Bevacqua and S. v. Bulgaria*, Appl. no. 71127/01, Judgment of 12 June 2008; *Branko Tomasic and Others v. Croatia*, Appl. no. 46598/06, Judgment of 15 January 2009; *Opuz v. Turkey*, Appl. no. 33401/02, Judgment of 9 June 2009; *E.S. and Others v. Slovakia*, Appl. no. 8227/04, Judgment of 15 September 2009; *N. v. Sweden*, Appl. no. 23505/09, Judgment of 20 July 2010; *A v. Croatia*, Appl. no. 55164/08, Judgment of 14 October 2010; *Hajduova v. Slovakia*, Appl. no. 2660/03, Judgment of 30 November 2010; *Kalucza v. Hungary*, Appl. no. 57693/10, Judgment of 24 April 2012; *E.M. v. Romania*, Appl. no. 43994/05, Judgment of 30 October 2012; *Valiuliene v. Lithuania*, Appl. no. 33234/07, Judgment of 26 March 2013; *Eremia and Others v. Moldova*, Appl. no. 3564/11, Judgment of 28 May 2013; *B. v. Moldova*, Appl. no. 61382/09, Judgment of 16 July 2013; *Mudric v. Moldova*, Appl. no. 74839/10, Judgment of 16 July 2013; *N.A. v. Moldova*, Appl. no. 13424/06, Judgment of 24 September 2013; *T.M. and C.M. v. Moldova*, Appl. no. 26608/11, Judgment of 28 January 2014.

²² There have been two cases involving domestic violence in which the Court declared the applications as inadmissible - *Kowal v. Poland*, Appl. no. 2012/11, Decision of 18 September 2012; *Irene Wilson v. United*

Immediately prior to *Rumor*, it seemed that the Court was beginning to make more extensive use of Article 3 in domestic violence cases than it had in previous years.²³ Although breaches of Article 3 were found in a number of the earlier cases,²⁴ in other cases, such as *Bevacqua and S v Bulgaria*,²⁵ *A v Croatia*²⁶ and *Kalucza v Hungary*,²⁷ the applicants had made arguments based on both Articles 3 and 8, with the Court subsequently finding violations of Article 8 and then stating that it was therefore unnecessary to examine the cases under Article 3 also. Finding a violation of one article and then omitting to examine the case under any other article cited by the applicant is of course an approach which is frequently adopted by the Court, and is certainly not limited to domestic violence cases. The main rationale for such an approach seems to be that it acts as a time-saving device. In general, there is no difficulty with this approach. To the individual applicant it is unlikely to matter a great deal whether the Court finds a violation of, for example, Article 8 as opposed to Article 3. However, where the difficulty arises is when an approach based on pragmatism is mistaken for an approach based on principle. This is essentially what happened in the 2013 case of *Valiuliene v. Lithuania*.²⁸ In this case, the state accepted that it had failed to respond in an adequate manner to a situation involving domestic violence. The Lithuanian government therefore submitted a unilateral declaration accepting that it was in violation of Article 8. It stated

Kingdom, Appl. no. 10601/09, Decision of 23 October 2012. In *Y.C. v. United Kingdom*, Appl. no. 4547/10, Decision of 13 March 2012, no violation was found, however this case related to an alleged breach due to the placement for adoption of a child whose parents had a violent relationship, as opposed to an alleged failure to respond in an appropriate manner to the violence itself.

²³ For discussion of the earlier jurisprudence on domestic violence, see R. McQuigg, *International Human Rights Law and Domestic Violence* (2011), at 42-59. For discussion of Art. 3 more generally, see for example Mavronicola, 'What is an absolute right? Deciphering absoluteness in the context of Article 3 of the European Convention on Human Rights', 12 *Human Rights Law Review* (2012) 723.

²⁴ *Opuz v. Turkey*, Appl. no. 33401/02, Judgment of 9 June 2009; *E.S. and Others v. Slovakia*, Appl. no. 8227/04, Judgment of 15 September 2009; *N. v. Sweden*, Appl. no. 23505/09, Judgment of 20 July 2010; *E.M. v. Romania*, Appl. no. 43994/05, Judgment of 30 October 2012.

²⁵ Appl. no. 71127/01, Judgment of 12 September 2008.

²⁶ Appl. no. 55164/08, Judgment of 14 October 2010.

²⁷ Appl. no. 57693/10, Judgment of 24 April 2012.

²⁸ Appl. no. 33234/07, Judgment of 26 March 2013.

however that it was not in violation of Article 3, commenting that ‘it could be said that the injuries sustained by the applicant had been of a merely trivial nature’.²⁹ It was clear from the state’s submissions that it regarded a violation of Article 8 as being a less serious matter than a breach of Article 3. The Court responded by refusing to accept the unilateral declaration and finding the state to be in breach of Article 3. Interestingly, the dissenting judge in the case, Judge Jociene (the Lithuanian judge), stated that she was of the view that ‘the Court has incorrectly relied on Article 3 in the circumstances of the present case’ and that, ‘This position of the Chamber is not supported by the Court’s case-law, where domestic violence cases are mostly examined from the perspective of Article 8 of the Convention.’³⁰ It is clear therefore that Judge Jociene was of the view that the general practice of the Court was to use Article 8 in cases of domestic violence, as opposed to Article 3, and that this approach was based on principle as opposed to being founded on practicality. It is likely that the decision of the Court to refuse to accept the unilateral declaration and instead to find a violation of Article 3 was the only course of action which the Court could take in order to refute such suggestions in an effective manner.

Following the decision of the Court in *Valiuliene*, it seemed that the way was open for a more expansive use of Article 3 in domestic violence cases. In another case against Lithuania, *D.P. v. Lithuania*,³¹ the state again admitted that it was in violation of the Convention due to a failure to respond adequately to a situation involving domestic violence. Again it submitted a unilateral declaration, however this time the declaration acknowledged that the breach was of Article 3. The Court accepted the declaration and struck out the application. Violations of Article 3 were also found in five domestic violence cases against Moldova, the judgments in which were issued between July 2013 and January 2014.³²

²⁹ At para. 55.

³⁰ At para. 10 of Dissenting Judgment of Judge Jociene.

³¹ Appl. no. 27920/08, Judgment of 22 October 2013.

³² *Eremia and Others v. Moldova*, Appl. no. 3564/11, Judgment of 28 May 2013; *B. v. Moldova*, Appl. no. 61382/09, Judgment of 16 July 2013; *Mudric v. Moldova*, Appl. no. 74839/10, Judgment of 16 July 2013;

In *Rumor*, the Court held that the violence and the ensuing psychological consequences which the applicant had suffered were sufficiently serious to constitute ill-treatment within the meaning of Article 3. This is a positive finding, as it reinforces the point that it seems now to be firmly established that the Court regards domestic violence as falling within the ambit of Article 3. However, the Court was of the view that in this instance the state had fulfilled its Convention obligations in the matter. This finding emphasises the point that there are limits to how far the doctrine of positive obligations can reach to protect individuals from human rights violations occurring in the private sphere, such as domestic violence.³³ At the inception of human rights law, domestic violence was barely recognised as constituting a legal issue at all, let alone an issue which human rights law should address. As Burton comments, ‘Until the 1970s there was little recognition of domestic violence as an issue that ought to be tackled by the legal system’.³⁴ Instead, the main aim of the earliest human rights instruments was to protect the individual from abuse perpetrated by the state itself and by state actors. The objective was to ensure that there would be a sphere of activity with which the state would not interfere.³⁵ When applied to the issue of domestic violence, such an approach is not only useless, but arguably perpetuates the conditions which allow such violence to occur.³⁶ Although doctrines such as state responsibility³⁷ and positive obligations have been developed, the

N.A. v Moldova, Appl. no. 13424/06, Judgment of 24 September 2013; *T.M. and C.M. v. Moldova*, Appl. no. 26608/11, Judgment of 28 January 2014.

³³ For further discussion of positive obligations, see A. R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (2004). For discussion of positive obligations in the context of domestic violence, see R. McQuigg, *International Human Rights Law and Domestic Violence* (2011), at 43-46.

³⁴ M. Burton, *Legal Responses to Domestic Violence*, (2008), at 2.

³⁵ For discussion of the public/private dichotomy in international human rights law, see H. Charlesworth and C. Chinkin, *The Boundaries of International Law – A Feminist Analysis* (2000); Romany, ‘Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’, 6 *Harvard Human Rights Journal* (1993) 87; Cook, ‘Women’s International Human Rights Law: The Way Forward’ in R. J. Cook (ed.) *Human Rights of Women – National and International Perspectives* (1994) 228..

³⁶ See R. McQuigg, *International Human Rights Law and Domestic Violence* (2011), at 3-8.

³⁷ For further discussion of state responsibility, see Cook, ‘State Responsibility for Violations of Women’s Rights’, 7 *Harvard Human Rights Journal* (1994) 125; Romany, ‘State Responsibility Goes Private: A

question of who is inflicting the ill-treatment can still be of immense importance. The applicant in *Rumor* was attacked by her then partner, as a result of which she sustained concussion, head injuries and bruising. She was also left with psychological consequences, and lived in a state of a constant fear as a result of the incident. The treatment she had suffered was ‘inhuman and degrading’ and therefore her rights under Article 3 were breached. However, it is a fundamental principle of human rights law that, in general, only states can be held liable for violations. In *Rumor* it was essentially a private individual who had violated the applicant’s rights, and in general private individuals cannot be held to be in breach of human rights law. No matter how well-developed the European Court’s doctrine of positive obligations is, there are limits to how far it can reach to protect victims from rights abuses occurring in the private sphere.

However, although the Court held in *Rumor* that the state had fulfilled its obligations in the matter, was this finding justified? It is of course impossible to come to a definitive conclusion on this question, based only on the facts contained in the Court’s judgment. Nevertheless, there are certain indications that the state’s response may have been insufficient. Firstly, given the nature of the offence, an ultimate sentence of three years and four months’ detention seems to be somewhat short. There is no indication in the judgment as to why the original sentence of four years and eight months’ detention imposed in April 2009 was reduced eight months later. In June 2010, J.C.N. was then given permission to serve the remainder of his sentence at a reception centre facility. Little information on this facility is given in the judgment, however it is stated that J.C.N. was permitted to work outside the reception centre, and also that after he completed his sentence he chose to continue residing at the centre. It seems unlikely therefore that detention at the centre constituted a very punitive measure. In addition, the fact that this facility was situated only 15 kilometres from the applicant’s home is troubling, particularly as J.C.N. had been granted permission to work outside the facility. This is especially problematic given that the applicant had not been informed by the authorities that J.C.N. had been granted house arrest, and she had only become aware of this fact

Feminist Critique of the Public/Private Distinction in International Human Rights Law’ in R. J. Cook (ed.) *Human Rights of Women - National and International Perspectives* (1994) 85.

when she received a telephone call from J.C.N. himself. The applicant's allegation that she had been contacted by a worker at the facility for the purposes of setting up a telephone conversation between J.C.N. and their son also raises questions concerning the suitability of the facility. The state did not contest the truthfulness of this allegation.

In *Valiuliene*, one of the judges, Judge Pinto de Albuquerque, issued a Concurring Opinion in which he stated that 'the full *effet utile* of the European Convention on Human Rights...can only be achieved with a gender-sensitive interpretation and application of its provisions which takes in account the factual inequalities between women and men and the way they impact on women's lives.'³⁸ It is arguable that such a gender-sensitive interpretation of the Convention was missing from the European Court's judgment in *Rumor*. In its judgment, the Court noted that having J.C.N. living at a distance of only 15 kilometres from her home had 'a negative impact' on the applicant.³⁹ This seems to demonstrate an utter lack of awareness of the acute fear frequently suffered by those who have experienced domestic violence. Indeed, the applicant claimed that following the violence inflicted upon her by J.C.N., she lived in a state of constant fear and had undergone psychological support therapy. In relation to the fact that the applicant had not been informed by the authorities that J.C.N. had been granted house arrest, the Court stated that, 'the Convention may not be interpreted as imposing a general obligation on States to inform the victim of ill-treatment about the criminal proceedings against the perpetrator, including about possible release on parole from prison or transfer to house arrest.'⁴⁰ There may be no *general* obligation on states to inform victims about criminal proceedings against perpetrators, however surely it is arguable that a gender-sensitive application of the Convention may well encompass an obligation to inform a victim of domestic violence that not only is her abuser being moved to a facility situated only 15 kilometres from her home, but that he is also being permitted to work outside the facility. Indeed, a gender-sensitive application of the Convention may well encompass a duty to

³⁸ Concurring Opinion of Judge Pinto de Albuquerque.

³⁹ At para. 66.

⁴⁰ At para. 72.

refuse permission for the transfer to a facility situated within such close proximity to the victim's home in the first place.

5. The Court's Use of Article 14 in Domestic Violence Cases

In *Rumor*, the Court stated that in the light of its finding that there had been no violation of Article 3 of the Convention, it concluded for the same reasons that there had been no breach of Article 3 taken in conjunction with Article 14. It is important to remember however that a violation can be found of Article 14, even though no breach of the article with which the Article 14 claim is being taken in conjunction has been found. Although Article 14 was not specifically addressed by the Court, it is nevertheless noteworthy that the applicant chose to make an argument based on the Article 14 prohibition of discrimination. This serves to highlight the fact that there has been a recent upsurge in the use of Article 14 in cases involving domestic violence. This increased use of Article 14 in such cases is reflective of the way in which the Court's jurisprudence has been marked generally by a stronger use of Article 14 than was once the case. As O'Connell, writing in 2009, commented, although 'Article 14 is sometimes regarded as a Cinderella provision; the European Court of Human Rights...not developing it to have significant "bite"',⁴¹ nevertheless the Court has taken 'huge strides in its understanding of Art 14 in recent years.'⁴²

The first domestic violence case in which the applicant chose to make an argument based on Article 14 was *Opuz v. Turkey*.⁴³ In this case the applicant demonstrated through statistical data that domestic violence affected mainly women, and established that judicial passivity in Turkey created a climate that was conducive to domestic violence. In finding violations of Article 14 taken in conjunction with Articles 2 and 3, the Court stated that, 'Bearing in mind...that the general and discriminatory judicial passivity in

⁴¹ O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009) 211, at 212.

⁴² *Ibid.*, at 228.

⁴³ Appl. no. 33401/02, Judgment of 9 June 2009.

Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women.’⁴⁴ An argument based on Article 14 was again raised in *A v. Croatia*.⁴⁵ However, the Court declared in this case that the applicant’s complaint under Article 14 was inadmissible, as she had not given sufficient evidence, such as reports or statistics, to prove that the practices adopted in Croatia as regards domestic violence were discriminatory.

Article 14 was also raised in three recent domestic violence cases against Moldova. In *Mudric v. Moldova*,⁴⁶ the applicant had been living in a house next to that of her former husband, A.M. However, A.M. then moved into the applicant’s house and stayed there against her will. The applicant was subjected to violence from A.M. on a number of occasions, and the European Court observed that the authorities had been well aware of this. A.M. was allowed to live in the applicant’s house for more than a year. Three protection orders were made by the domestic courts, however these orders were not enforced. Police officers and a social worker visited the applicant’s house and talked with her and A.M., however the latter refused to leave the house or to sign a document stating that he had been warned not to commit acts of violence against the applicant. Despite the existence of several domestic legal provisions which would have allowed the authorities to initiate criminal proceedings against A.M. and to subject him to a psychiatric examination with a view to deciding on the need to order compulsory psychiatric treatment, it nevertheless took the authorities almost a year to adopt such a course of action. The European Court found that there had been a violation of Article 3. The Court then proceeded to state that ‘the authorities’ actions were not a simple failure or delay in dealing with violence against the applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards her as a

⁴⁴ At para. 200.

⁴⁵ Appl. no. 55164/08, Judgment of 14 October 2010.

⁴⁶ Appl. no. 74839/10, Judgment of 16 July 2013.

woman.’⁴⁷ The Court referred to a report of the UN Special Rapporteur on violence against women, its causes and consequences which highlighted the high levels of domestic violence in Moldova and which stated that discriminatory attitudes among society as a whole constituted a major contributory factor to the high prevalence of violence against women in the home.⁴⁸ The Court was of the view that the findings of the Special Rapporteur supported ‘the impression that the authorities do not fully appreciate the seriousness and extent of the problem of domestic violence and its discriminatory effect on women.’⁴⁹ It was therefore held that there had been a violation of Article 14 taken in conjunction with Article 3. Likewise, in *Eremia and Others v. Moldova*⁵⁰ the Court found that the authorities’ attitude had amounted to condoning violence and had been discriminatory towards Ms. Eremia as a woman. Therefore, in addition to a violation of Article 3, the Court also found a violation of Article 14 taken in conjunction with Article 3 in respect of the violence which she had suffered.

In *T.M. and C.M. v. Moldova*,⁵¹ the applicants were a mother and daughter who had been subjected to violence by their husband and father, who is referred to in the judgment of the European Court as M.M. Again the Court found that there had been a breach of the applicants’ rights under Article 3 of the Convention. In relation to the argument that there had also been a violation of Article 14, the Court pointed out that ‘the State’s failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional’.⁵² The Court noted that the first applicant was subjected to violence from her husband on a number of occasions and that the authorities had been well aware of these attacks. A prosecutor had refused to begin a criminal investigation as the injuries on the first applicant’s body were not regarded as

⁴⁷ At para. 63.

⁴⁸ A/HRC/11/6/Add.4, 8 May 2009.

⁴⁹ At para. 63.

⁵⁰ Appl. no. 3564/11, Judgment of 28 May 2013.

⁵¹ Appl. no. 26608/11, Judgment of 28 January 2014.

⁵² At para. 57.

being of sufficient severity to merit such an investigation. The Court was of the view that this underlined ‘the failure to realise, or to explain to the law-enforcement authorities, the specific nature of domestic violence, which does not always result in physical injury.’⁵³ In addition, the authorities took a considerable length of time to consider the first applicant’s request for a protection order, and then failed to send the order for enforcement. Thereafter, the police failed to take resolute action to remove the abuser from the common residence, and the domestic court then suspended enforcement of the order. Ultimately the first applicant was forced to leave her home and move into refuge accommodation. The European Court stated that,

The authorities’ passivity in the present case is also apparent from their failure to consider protective measures before a formal application to that end was made, or to initiate a criminal investigation against M.M. before an official complaint about that was made...Considering the particular vulnerability of victims of domestic violence, who often fail to report incidents, it was for the authorities to verify whether the situation warranted a more robust reaction of the State and to at least inform the first applicant of the existing protective measures.⁵⁴

The Court is to be commended for its recognition of the fact that domestic violence is a crime which victims are often too frightened or too ashamed to report, and that domestic violence may therefore require a somewhat different response from state authorities than that which is required as regards other forms of violence. Indeed this recognition, together with the Court’s previous comment that the nature of domestic violence is such that it does not always result in physical injury, seems to indicate that the Court was attempting to engage with a ‘gender-sensitive interpretation and application of (the Convention’s) provisions which takes in account the factual inequalities between women and men and the way they impact on women’s lives’,⁵⁵ as was recommended by Judge Pinto de Albuquerque in his Concurring Opinion in *Valiuliene*.

⁵³ At para. 59.

⁵⁴ At para. 60.

⁵⁵ Appl. no. 33234/07, Judgment of 26 March 2013, Concurring Opinion of Judge Pinto de Albuquerque.

As in its judgment in *Mudric*, the Court again stated in *T.M. and C.M.* that ‘the authorities’ actions were not a simple failure or delay in dealing with violence against the first applicant, but amounted to condoning such violence and reflected a discriminatory attitude towards her as a woman.’⁵⁶ In addition to citing the findings of the UN Special Rapporteur on violence against women, its causes and consequences as regards attitudes towards domestic violence in Moldova, the Court also referred to statistical data which had been gathered by the National Bureau of Statistics. In a report entitled ‘Violence against Women in the Family in the Republic of Moldova’, the National Statistics Bureau indicated that violence against women was deeply rooted and widespread in Moldovan society, and was repeated down through generations. The report stated that violence against women was rooted in their inequality with men, and that there was widespread social acceptance of such violence. The Court in *T.M. and C.M.* ultimately held that there had been a breach of Article 14, taken in conjunction with Article 3, in respect of the first applicant.

The findings of violations of Article 14 by the European Court in the above cases is certainly to be welcomed, as this demonstrates a recognition on the part of the Court that one of the principal causes of domestic violence is the structural inequalities within society. It is interesting to note that there are also currently two applications pending before the Court – *Kilic v. Turkey*⁵⁷ and *Munteanu v. Moldova*⁵⁸ - which relate to domestic violence and in which the applicants are making arguments based *inter alia* on Article 14. It is therefore likely that the Court’s jurisprudence on the use of Article 14 in domestic violence cases will continue to develop in the near future.

Viewing domestic violence as a form of gender-based discrimination is not, of course, a new approach. Within the UN context, domestic violence was officially recognised by the CEDAW Committee as constituting a form of gender-based discrimination as far

⁵⁶ At para. 62.

⁵⁷ Appl. no. 63034/11.

⁵⁸ Appl. no. 34168/11.

back as 1992 when the Committee issued its General Recommendation 19. This document asserted that,

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately ... Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.⁵⁹

It was emphasised,

that discrimination under the Convention is not restricted to action by or on behalf of Governments ... Under general international law and specific human rights covenants, States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.⁶⁰

The view of domestic violence as constituting a form of gender-based discrimination is therefore well-established within the UN context, and the fact that this approach is now gaining an increased level of recognition within the context of the Council of Europe is certainly to be welcomed. In addition, this recognition is not only limited to the case law of the European Court of Human Rights, as will be seen below.

6. The Istanbul Convention

The developments within the Council of Europe on the issue of domestic violence are not restricted to the jurisprudence of the European Court. The Istanbul Convention on gender-based violence entered into force on 1 August 2014. Interestingly, the Court's recognition of domestic violence as constituting a form of gender-based discrimination is reflected in this instrument. Article 1(b) of the Convention states that one of its purposes is 'to contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women'. This statement is reinforced by Article 4(2), which asserts that, 'Parties

⁵⁹ CEDAW Committee, General Recommendation 19, U.N. Doc A/47/38, 1992, para. 6.

⁶⁰ At para. 9.

condemn all forms of discrimination against women and shall take, without delay, the necessary legislative and other measures to prevent it'. As Italy is one of the 16 states which have ratified the Convention to date, it is interesting to speculate on whether the response of the state to the situation in *Rumor* would have complied with the obligations which Italy now has under the new Convention.

Under Article 45(1) of the Convention, 'Parties shall take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness.' Applying this provision to the situation which arose in *Rumor*, it is debatable whether a sentence of three years and four months' detention, a substantial part of which was spent in a reception centre with permission to work outside the facility, would constitute an 'effective, proportionate and dissuasive' sanction, given the seriousness of the offence and the injuries which were suffered by the applicant. Article 46(a) of the Convention states that it should be regarded as an aggravating factor if an offence is committed against a former or current spouse or partner, or a person cohabiting with the victim. This would clearly apply to the situation in *Rumor*. Article 46(d) states that the offence being committed in the presence of a child is another aggravating factor. In *Rumor* the violence was witnessed by the applicant's son. Under Article 46(f) and (h), aggravating factors also include the offence being 'accompanied by extreme levels of violence', and the offence resulting in 'severe physical or psychological harm for the victim'. Both of these factors would be applicable as the violence in *Rumor* was so extreme that the applicant ended up with concussion and other head injuries, and also required psychological support therapy. Finally, Article 46(g) of the Convention lists the offence being committed with the use or threat of a weapon as being an aggravating factor. In *Rumor* the applicant was threatened with a knife.

Under Article 56(1)(b) of the Convention, 'Parties shall take the necessary legislative or other measures to protect the rights and interests of victims...at all stages of investigations and judicial proceedings, in particular by...ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the

perpetrator escapes or is released temporarily or definitively.’ Article 56(1)(c) states that victims should be informed of ‘the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case’. These provisions seem to differ significantly from the statement made by the European Court in *Rumor* that ‘the Convention may not be interpreted as imposing a general obligation on States to inform the victim of ill-treatment about the criminal proceedings against the perpetrator’.⁶¹

It appears therefore that the response of the state in *Rumor v Italy* may well have been insufficient to comply with the provisions of the Istanbul Convention. This fact in itself demonstrates the potential value which the new Convention holds. The European Convention on Human Rights was not designed to encompass an issue such as domestic violence within its ambit. However, the new Convention is tailor-made to address domestic violence and other forms of violence against women. It places detailed obligations on states in these areas, in contrast to the much more general duties placed on states by the European Court of Human Rights as regards domestic violence.

Nevertheless, the coming into force of the Istanbul Convention does not mean that there is no longer any need for the development of the European Court’s case law under the European Convention on Human Rights on the issue of domestic violence. It must be remembered that currently only 16 states have ratified the new Convention. This is in contrast to the 47 states which are party to the European Convention on Human Rights. Also, there is no mechanism under the Istanbul Convention whereby individuals can take cases or make complaints concerning violations of the Convention. Under Article 66(1), the implementation of the Convention will be monitored by a Group of experts on action against violence against women and domestic violence, known as ‘GREVIO’. The main monitoring mechanism for the Convention is a reporting procedure,⁶² similar to those of the UN human rights treaties such as CEDAW, and also to those of other Council of

⁶¹ At para. 72.

⁶² Article 68 of the Convention also allows for an inquiry procedure.

Europe treaties such as the European Social Charter and the Framework Convention for the Protection of National Minorities. By contrast, the enforcement of the European Convention on Human Rights depends primarily on litigation. A litigation strategy can of course be problematic when dealing with an ‘unseen crime’ such as domestic violence, which victims are often reluctant to report. Also, judges must confine themselves to dealing only with the specific question in the case that is before them. This obviously places limits on the role that litigation can play in promoting change. In making recommendations to states, a body such as GREVIO can take a much broader approach. Nevertheless, litigation still has an important role to play. It is crucial that there is a mechanism whereby a victim of domestic violence may take a case at the European level to assert that her rights have been violated.⁶³ The case law of the European Court of Human Rights will therefore remain of substantial importance in this context.

7. Conclusion

In conclusion therefore, it is clear that the European Court of Human Rights has now built up a substantial body of jurisprudence as regards the issue of domestic violence. There have been a number of very positive recent developments within this case law, such as the firm establishment of the principle that domestic violence falls within the ambit of Article 3 of the Convention. The increased use of Article 14 in domestic violence cases is also to be welcomed, as this serves to highlight the principle that one of the key causes of domestic violence is the structural inequalities within society.

However, the recent case of *Rumor* serves to highlight the limitations of human rights law when applied to the issue of domestic violence. Even with a sophisticated doctrine of positive obligations, there are limits to how far human rights law can reach to protect individuals from violations occurring in the private sphere, such as domestic violence. Even though the ill-treatment which the applicant had suffered was certainly ‘inhuman and degrading’, no breach of the Convention was found, as it was held that the state had

⁶³ It is also worth noting that at the UN level individual complaints can be taken under the Optional Protocol to CEDAW.

fulfilled its obligations in the matter. However, had the state fulfilled its duties in reality? There are indications in the judgment that it may not have done so, and it is at least arguable that the Court itself failed to adopt a sufficiently gender-sensitive interpretation and application of the Convention in this case.

The entry into force of the Istanbul Convention constitutes another important development as regards the issue of domestic violence in the context of the Council of Europe. The fact that the response of the state in *Rumor* may well have been insufficient to comply with the provisions of this Convention, even though no violation of the European Convention on Human Rights was found, demonstrates the potential held by the new Convention. Essentially this instrument places detailed obligations on states as regards their responses to violence against women, in contrast to the much more general duties placed on states by the European Court of Human Rights. Nevertheless, it is arguable that the Court could, and should, develop the concept of positive obligations in cases involving violence against women to encompass measures which are more in line with what the new Convention requires, thereby adopting a more gender-sensitive interpretation of the European Convention on Human Rights. This would involve a certain amount of ‘judicial creativity’, however the Court has already shown a substantial degree of creativity in producing the concept of positive obligations in the first place. It is also noteworthy that the Court does refer to other instruments in its judgments, for example the provisions of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment have influenced the development of the Court’s jurisprudence, and indeed the Court has begun to use the Charter of Fundamental Rights of the European Union as a source of interpretation of the European Convention on Human Rights.

The coming into force of the new Convention certainly does not mean that there is no longer a need for the development of the European Court’s case law under the European Convention on Human Rights on the issue of domestic violence. In particular, the Court’s jurisprudence is applicable to all 47 states which are party to the European Convention on Human Rights, and therefore currently has a much broader reach than the

new Convention. In addition, there is no mechanism under the Istanbul Convention whereby individuals can make complaints concerning violations of this instrument. It will certainly prove extremely interesting to observe the operation of the new Convention, particularly when the first cycle of state reporting commences.

Likewise, it will prove equally interesting to observe how the case law of the European Court of Human Rights on the issue of domestic violence develops in the near future. As mentioned earlier, there are currently a number of applications pending before the Court which involve domestic violence.⁶⁴ Interestingly, the applicants in three of these cases - *Wasiewska v. Poland*, *Khachatryan v. Belgium* and *D.M.D. v. Romania* - are arguing that there have been breaches of *inter alia* Article 6 of the Convention, the right to a fair trial. An increased use of Article 6 in domestic violence cases may constitute a future development in this area. In addition, although it has now been established that domestic violence breaches Article 3, there have been no judgments establishing whether domestic violence constitutes inhuman and degrading treatment alone, or if it may in some cases amount to torture. Certainly there are commentators who have likened domestic violence to torture,⁶⁵ and a finding by the European Court that domestic violence may amount to torture would serve to emphasise the deplorable nature of the practice. It remains to be seen whether the Court will take such a step in the future.

⁶⁴ *Camarașescu v. Romania*, Appl. no. 49645/09; *Khachatryan v. Belgium*, Appl. no. 72597/10; *Munteanu v. Moldova*, Appl. no. 34168/11; *Kilic v. Turkey*, Appl. no. 63034/11; *Wasiewska v. Poland*, Appl. no. 9873/11; *D.M.D. v. Romania*, Appl. no. 23022/13.

⁶⁵ For example, Copelon, 'Intimate Terror: Understanding Domestic Violence as Torture', in R. Cook (ed.), *Human Rights of Women – National and International Perspectives* (1994) 116; Grdinic, 'Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence', 23 *Hastings International and Comparative Law Review* (2000) 217.